Supreme Court, U.S.
FILED
MAR 31 1992
OFFICE OF THE CLERK

(2)

No. 91-1348

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MADISON CABLEVISION, INC.,
Petitioner,
v.
THE CITY OF MORGANTON, NORTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment prohibits a city from choosing to operate its own cable television system, when that system is demonstrably superior to one proposed by the incumbent operator, where the market cannot now support more than one system.

2. Whether the First Amendment gives a disappointed cable television franchise applicant the right to have a federal court review the city's decision, not on the record before the city, but on the basis of affidavits contrary to evidence the applicant presented during the franchising process.

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CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*, provides in relevant part that:

> A franchising authority may award . . . 1 or more franchises within its jurisdiction. 47 U.S.C. § 541(a)(1).
>
> [A] State or franchising authority may hold any ownership interest in any cable system. 47 U.S.C. § 533(e)(1).
>
> Any State or franchising authority shall not exercise any editorial control regarding the content of any

> cable service on a cable system in which such governmental entity holds ownership interest . . . unless such control is exercised through an entity separate from the franchising authority. 47 U.S.C. § 533(e)(2).

STATEMENT

The facts in this case are set forth in two decisions of the district court, Petition Appendix A ("Pet. App.") at 5a-11a, 33a-36a, and in the decision of the North Carolina Supreme Court in *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 636-41, 386 S.E.2d 200, 203-04 (1989). Without explanation, the Statement of Petitioner Madison Cablevision, Inc. ("Madison")[1] departs from the record and from the undisputed facts as found by the state and federal courts.

1. *The cable franchising process in Morganton.*

Madison provided cable television service in the City of Morganton pursuant to a non-exclusive, twenty-year franchise contract. Pursuant to the franchise contract, Madison placed wires on city-owned poles and constructed other facilities in public easements, rights of way, and on city-owned property. 325 N.C. at 638, 386 S.E.2d at 203. The franchise did not include any renewal provision and instead gave the City the option either to purchase the system at the end of the contract term or to require Madison to remove its system. The franchise was scheduled to expire in October, 1986. Pet. App. 34a.

In late 1983, the City began to gather information and develop procedures for determining the future of cable television in Morganton. The City hired an independent

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[1] Madison is wholly owned by Tele-Communications, Inc. ("TCI"), which is a party to the proceedings below. During the renewal process, TCI supplied the renewal proposal and other information to Morganton. In the record of the proceedings before the City, Madison was often referred to as TCI; references in that record to TCI are references to Madison, and vice versa.

consulting firm and commissioned three studies: (1) an analysis of comparable cable systems; (2) a study of local cable-related needs and interests; and (3) a municipal cable television feasibility study. *Id.* at 34a. The City told Madison that studies were being performed and that the first two studies would be completed by April, 1984. Each of the three studies was available for public review on completion. 325 N.C. at 639, 386 S.E.2d at 203.[2] Collectively, the studies indicated that the cable system then existing in the City was inadequate, that the City needed a modern cable communications system, and that a City-owned and City-operated system was feasible. *Id.*[3]

On September 24, 1984, after reviewing the three studies, the City issued a Request for Information ("RFI") to the general public and provided copies of the RFI to three private cable companies which had expressed an interest in providing cable service to the City—Madison, Burke Cable Company, Ltd. ("Burke"), and Catawba Valley Cable TV ("Catawba"). The RFI stated that a public hearing would be held on November 14, 1984 to (Pet. App. 35a):

(a) determine "whether the franchise then held by Madison Cable should be renewed;"

(b) determine if "other private cable companies were interested and capable of providing cable service in the City of Morganton;"

(c) determine "whether Morganton should establish a municipal cable television system;"

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[2] When Madison states (Pet. 3) that "[n]either Madison nor the public were informed about the consultants' conclusions" it must mean that it chose not to examine these public record documents, all of which were available by August, 1984.

[3] Madison states that the municipal feasibility study "assumed" the City would capture all of Madison's subscribers. Pet. 3. No such assumption was made: the study considered whether a municipal system would be financially viable at various levels of subscribership. Court of Appeals Appendix ("C.A. App.") 729-30.

(d) determine if "there was any interest" in construction of a second cable system; and

(e) determine if the City of Morganton could reasonably support more than one cable system in the long term.

These companies and the public were invited to comment on the City's studies, to describe the advantages and disadvantages of municipal ownership and to submit information concerning the feasibility of a second cable system in Morganton (a practice known as "overbuilding"). Each responding cable company was invited to submit a proposal describing the cable system it intended to build if it were granted a franchise. 325 N.C. at 640, 386 S.E.2d at 203. Because the City's studies were available for review, each applicant was in a position to know what types of systems the City believed would satisfy its needs, and had the opportunity to tailor its proposal accordingly.

Every applicant had reason to prepare its proposal with care. The RFI stated that "the City intends to rely on responses to this information request and statements at the hearing in making determinations as to the future of cable service in Morganton," so that "while operators are free to participate or not participate, and to present a detailed or general proposal as desired, the completeness and timeliness of a presentation may affect the City Council's ultimate determinations." C.A. App. 386.

Madison, Burke and Catawba responded in writing to the RFI, and each appeared at the public hearing. At the hearing, the City introduced copies of its consultant's reports, the written submissions of the cable companies, complaints received from the public, reports prepared by the City staff and a notebook containing clippings concerning Madison and the other applicants. The public, the cable companies and the City staff then made oral

presentations and questioned one another. Pet. App. 8a-9a.

Madison actively participated in the proceedings. It submitted a 759-page response to the RFI. At the hearing, Madison's three representatives presented prepared statements and asked questions of the City staff and consultants. Madison had a court reporter record the proceedings.

Madison was particularly vocal on the issue of whether the public rights of way in Morganton could support more than one cable system. Madison told the City Council that if two cable franchises were issued:

- "We estimate that 90% of the poles would require extensive make-ready" and over "one-half of the poles would have to be replaced."
- " . . . the present facilities would require massive make-ready and pole replacements."
- ". . . service disruptions are likely to occur to existing cable subscribers when more than one cable company exists in a community . . ."

In addition, Madison told the City that:

- ". . . very few cities can support more than one company . . . to grant more than one franchise ultimately may cause all but one to fail."
- "If more than one company does survive . . . prices may have to go higher . . .
- ". . . Built-in inefficiencies exist in dual management costs [etc.], which will be paid for by the community."
- ". . . additional companies mean more unsightly cables on the poles . . ."
- ". . . every experience the Company has ever had indicates overbuilding results in one company surviving and increased cost to subscribers."

Pet. App. 18a-19a.

At the end of the hearing, the cable companies were given an opportunity to submit additional material and to respond to any evidence that had been presented. 325 N.C. at 640, 386 S.E.2d at 204.[4] Each company was invited to raise any procedural issues it believed significant. In its post-hearing submission, Madison did not criticize the process, but noted that it "was very pleased with the way the meeting went on November 14." C.A. App. 549.

Madison re-emphasized that no "*reputable* cable operators" (emphasis in original) would recommend authorizing a second cable system. It warned that if a second cable system was authorized, the City could be left "with a mess on their hands." Pet. App. 19a.

The City took the renewal issues under advisement. On March 28, 1985, a draft decision was sent to Madison. Madison asked the City to delay formal adoption of the decision to give the City and Madison an opportunity to settle issues. C.A. App. 249-255. The City delayed adoption, but Madison and the City were unable to settle matters.[5]

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[4] As the district judge found, Madison was given "four opportunities" to present its case to the City. These were:

> (1) in its response to the Request for Information, (2) through supplemental written information before the public hearing began; (3) through oral and written presentation at the public hearing with the right to testify, offer witnesses and to examine other witnesses; and (4) in its submission of further written material within 30 days after the public hearing.

Pet. App. 27a.

[5] Madison suggests that the City hurried the renewal proceedings and then delayed final judgment for unstated (but presumably sinister) reasons. Pet. 4. In fact, Madison shaped the procedural schedule throughout. In addition to asking the City to delay adoption of a final order, Madison asked for 30 days to submit additional information after the hearing; both requests were granted. C.A. App. 536-37.

2. *The City's decision.*

Based on a more than 1,200-page record developed through the renewal process, the City Council adopted Ordinance No. 85-58 ("1985 Ordinance") on September 9, 1985.[6] The City Council made three separate decisions (C.A. App. 112):

> "1. TCI's franchise should not be renewed. Within 90 days of this order TCI should submit a plan for orderly removal of its equipment from City poles at the end of the franchise term.
>
> 2. Burke and Catawba will not at this time be granted franchises for the City of Morganton.
>
> 3. The City staff should begin the steps necessary to enable the City to establish a municipal system."

The City did not shut down Madison's system; the Council's Opinion stated that the City would allow the existing franchise to expire. The City did not declare or establish itself as the "exclusive" supplier of cable television service to its citizens. 325 N.C. at 640, 386 S.E.2d at 204. Instead, the City expressly stated that "[s]hould any operator desire to seek a franchise in the future, the Council does not foreclose that possibility." *Id.*

The Opinion states that Morganton decided to allow Madison's franchise to expire for four reasons. First, the City Council found that the system Madison said it would provide for the renewal term was inferior to the systems proposed by all other respondents to the RFI, inferior to the proposed municipal system, and inferior to some systems that had been constructed in communities similar in size to Morganton.[7] Second, the City

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[6] The 1985 Ordinance incorporated a nineteen page "Opinion of the City Council of Morganton Regarding Cable Television" ("Opinion") with an accompanying sixty-six page Appendix. The Opinion provides the detailed bases for each of the conclusions reached in the 1985 Ordinance. C.A. App. 104-93.

[7] The comparative analysis showed, *inter alia*, that some systems in similar-sized communities served by TCI had greater channel

Council concluded that Madison's proposed system would not meet the future cable-related needs and interests of the community as identified in the community ascertainment study. Third, it concluded that Madison had not demonstrated the degree of care or candor that the City had a right to expect from a franchisee.[8] Finally, the City stated that Madison's past service did not warrant renewal.[9] The City made it clear that Madison's request for a renewal franchise would have been denied whether or not the City opted for a municipal system. C.A. App. 106, 112-117.

The Council decided that it could not ignore the deficiencies in Madison's past performance and proposed system and simply authorize construction of additional systems. In addition to the comments made by Madison, all of the cable companies appearing before the Council stated that Morganton's existing utility poles could not support two systems, and that overbuilding was not economically practical and would work to the long-term

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capacity, had two-way activated systems, and provided substantial facilities and equipment which could be used by anyone to produce and cablecast programming on the system ("access" provisions). The City and other applicants for a franchise planned to provide greater channel capacity, two-way activated capability, and more facilities and equipment for access than Madison proposed. Madison has never claimed that the comparative study was inaccurate, or that the City misunderstood the character of the systems proposed by Madison or other franchise applicants.

[8] As the district judge concluded, for example (Pet. App. 17a), "the Council found that Madison had not been candid in its representations to the City . . . . This finding is supported by the fact that Madison denied it had ever had a franchise revoked when in fact its franchise in Richland County, South Carolina had been revoked."

[9] The City was concerned about Madison's admitted failure to wire the entire community during the 20 years it had held the franchise. The City also found that Madison had been unable to respond to some local problems because of the necessity of obtaining approval of local budgets by corporate headquarters. Madison has never denied that these problems existed.

detriment of Morganton's citizens. Pet. App. 19a. Consistent with this undisputed record, the Council found that it had to choose the best proposal before it. It ultimately authorized construction of the proposed City-owned system, because that system, *inter alia*, would provide greater channel capacity and have more advanced capabilities than the alternatives.

The Council's decision did not prevent Madison (or other companies) from communicating via a cable system in Morganton. The proposed municipal system will offer several channels that any member of the public, including Madison, will be able to use to originate and cablecast programming.[10] The Council concluded that ". . . appropriate and adequate provision of access . . . serves the public interest better than grant of multiple franchises where the record indicates there can be no meaningful, long-term competition by overbuilds, and affirmative public harm will result." C.A. App. 123.

3. *The district court decision and the appeal.*

After the City adopted the 1985 Ordinance, Madison filed suit in federal district court. Madison claimed that the Ordinance violated the Cable Communications Policy Act of 1984 ("Cable Act"); the First Amendment; the Fifth Amendment's "takings" clause; the Equal Protection Clause of the Fourteenth Amendment; the Sherman Act and state constitutional and statutory provisions prohibiting monopolies; and 42 U.S.C. § 1983. C.A. App. 12-23. Madison also claimed that the decisions to deny it renewal and to establish a municipal system tortiously interfered with Madison's contracts, breached the franchise between Madison and the City and violated the public purpose clause of the North Carolina Constitution that (Madison claimed) prohibited municipal ownership. *Id.* at 23-27. Madison finally claimed that one provision of the exist-

[10] These channels are referred to as "public access" and "leased access" channels. 47 U.S.C. §§ 531, 532.

ing franchise, a provision that permitted the City to purchase the cable system at the end of the franchise term, was unconstitutional. *Id.* at 27-29. Madison did not claim that the City's decision was in any respect content-based.

The City moved for summary judgment. Madison submitted several affidavits to the district court as part of its opposition to the City's summary judgment motion.[11] While Madison had previously told the City that the rights of way in Morganton could not physically or economically support two systems, these affidavits were introduced for the ostensible purpose of showing that Morganton could support more than one cable system. However, the affidavits in fact did not say that *existing* poles could accommodate two systems or that two cable systems could survive in Morganton.

The district court ruled that the 1984 Cable Act did not apply to this renewal, abstained from deciding other federal issues, and directed Madison to file a complaint on the state monopoly and public purpose arguments in state Superior Court. Madison's state court complaint was dismissed on summary judgment; Madison appealed to the North Carolina Supreme Court. That Court affirmed, ruling that the City could establish a municipal system. It further ruled, as a factual matter, that the City had not established a monopoly, and had not violated North Carolina statutory or constitutional provisions prohibiting monopolies. 325 N.C. at 654, 386 S.E.2d at 211-12.

The case returned to the federal district court, where the City renewed its motion for summary judgment.

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[11] Madison claims it was denied discovery (Pet. 5), but in fact discovery requests it made were correctly quashed, *inter alia*, because Madison's discovery requests were aimed at determining the individual motives of the members of the City Council. Madison has not appealed the discovery orders, although it continues to complain about them.

The district court first reviewed all of Madison's contentions and concluded that there were no material factual issues precluding summary judgment. Pet. App. 13a. The court ruled that the affidavits submitted by Madison were irrelevant. Among other reasons, it stated (*id.* at 15a): "To allow a franchisee to challenge the franchising process in Court on the basis of information which is contrary to information given earlier or which could have been presented but was not, undermines cable regulation." However, the district court also ruled that, even if the affidavits were considered, they would fail to raise a material issue of fact requiring trial. *Id.* at 20a.

The district court then analyzed Madison's First Amendment claims based on the full record of the proceedings before the City Council. The district court concluded that the City's decision was content neutral, a conclusion Madison has never challenged. *Id.* at 16a. The court therefore applied the test set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The court scrutinized the record at length to determine whether the City's decisions satisfied each part of the *O'Brien* test. Pet. App. 16a-22a. Based on that analysis, the court concluded that the 1985 Ordinance "passes muster under the First Amendment." *Id.* at 22a.

Madison appealed, asking the Fourth Circuit to determine whether the district court had erred in "refusing to consider Madison's evidence in support of its claims" and whether the City's action "prohibiting Madison" from continuing to provide cable service "and establishing a municipal cable system to serve Madison's customers" violated the First Amendment.[12] The Court

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[12] In addition, Madison asked the Court of Appeals to determine "whether there was any genuine issue as to any material fact"; "whether the City's actions in refusing to renew and the procedures used" deprived Madison of due process; whether the City's actions violated 42 U.S.C. § 1983; whether Madison was entitled to renewal under the Cable Act; and whether the City breached its

of Appeals "considered the record" and concluded that "Madison Cable's suit was properly dismissed . . . for the reasons stated by the district court in its careful and thoughtful opinion." *Id.* at 3a.

While the case was pending before the Court of Appeals, Madison decided to take the issues to the voters of Morganton. It mounted a petition drive that placed on the ballot a referendum issue that would have required the City to issue Madison a renewal franchise and to abandon efforts to establish a municipal cable system.[13] On March 10, 1992, voters in Morganton rejected the ballot initiative, 72 percent to 28 percent.

ARGUMENT

Madison asks this Court to grant certiorari to review an unpublished decision of the federal district court for the Western District of North Carolina, and the unpublished, *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court's decision. The Petition should be denied.

Madison's Petition depends on an inaccurate portrayal of the record before the courts below and an inaccurate description of what those courts did. Madison's first question for review is grounded on the assertion that the City "shut down the existing cable system," prohibited "service by other private companies," and granted itself a monopoly." Pet. i, 7. That is not what the City did, as the federal and state courts found. *See infra* at 14-18. Madison bases its second question for review on the assertion that the courts below failed to consider evidence Madison sought to present to them. Pet. i, 5-6, 8. In fact, the courts below reviewed Madison's evidence, assumed it to be true, but concluded the evidence did not raise material

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contractual obligations of good faith and fair dealing. None of these claims is presented in the Petition.

[13] This is the local citizens' initiative referred to at Pet. 4-5, n.3.

issues of fact. Pet. App. 20a. Because the first question is not presented on the record and the resolution of the second question would not affect the outcome, certiorari should be denied.

Even setting aside Madison's factual misstatements, the Petition does not raise issues that warrant this Court's discretionary review. Madison points to two alleged errors which it claims are of important constitutional dimension. It argues that the courts below misapplied the test set forth in *United States v. O'Brien*, 391 U.S. at 377, because those courts improperly deferred to the City's judgments by failing to require the City to show that its actions were the "least restrictive alternative" available to it. Pet. 12-13. However, this Court has made it very clear that under the *O'Brien* test, a governmental action cannot be invalidated simply on the ground that there is a "less restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). Moreover, the "less restrictive alternative" Madison proposes is authorizing overbuilding, which Madison told the City was not physically or economically feasible. The courts below scrutinized the City's actions precisely as required by this Court's decisions.

Madison also argues that the lower courts erred in ruling (in the alternative) that certain affidavits submitted by Madison need not be considered. Madison fails to mention that the rejected affidavits were presented to contradict evidence Madison itself had presented to the City during the franchising process. Thus, the courts below merely ruled that Madison could not create a First Amendment issue requiring trial by contradicting itself. This conclusion is sound and uncontroversial.

Despite Madison's hyperbole, the decision in this case raises no novel issues. It is entirely consistent with the decisions of other U.S. Courts of Appeals. Madison was at the end of its contract term, had provided poor service,

and would continue to do so in the future. The City simply failed to renew Madison's franchise, allowing it to expire in accordance with its terms; the courts below found that that decision was fully justified. Madison's request for renewal would have been denied whether or not a municipal system was established.

The lower courts found that Morganton could support only one cable system now, and that issuing two franchises would result in affirmative harms of a sort government may prevent. Hence, the decision to issue one franchise was justified. Based on the record before it, the City had to choose among competing applicants to build a cable system on public property. Because it is undisputed that the proposed municipal system offered greater channel capacity, more advanced technological capabilities and greater access than other proposed systems, the City's decision to put its own property to optimal use by establishing a municipal cable system raises no serious constitutional questions. Indeed, Madison is complaining because the City did just what Madison said the City should do during renewal proceedings: authorize construction of a system by the applicant that offered to build the best system.

I. THIS CASE DOES NOT GENUINELY RAISE THE QUESTIONS PRESENTED IN THE PETITION.

A. Madison Mistakenly Claims That the City Took Actions It Did Not Take.

Madison claims that certiorari should be granted because the City "shut down" the existing system owned by Madison, prohibited "service by other private companies" and "granted itself a monopoly over the medium of cable television." Pet. 7. The City, however, did not take any of these actions.

The City did not "shut down" Madison's system. As shown above, Madison had a 20-year franchise that

expired in 1986. The City now has a right either to buy the system or to require Madison to remove it, in accordance with the terms of the franchise contract between the City and Madison. Absent an absolute right to a franchise (a right Madison does not claim before this Court), the City had every reason to deny renewal and allow the contract to expire. As the courts below found, Madison had provided bad service in the past and would provide an inadequate system for the future.[14] This alone is fatal to Madison's Petition. If the decision to deny was proper, Madison has no standing to challenge any other aspect of the City ordinance because such challenges could not afford Madison relief for its claimed injury.[15]

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[14] Madison does not challenge the courts' conclusion that denial of renewal was justified, other than to make the conclusory charge that the lower courts ignored its "franchise proposal, its explanations, its customer surveys and opposing arguments." Pet. 18. The district court's decision shows that the court reviewed and based its decision upon statements and explanations made by Madison in its renewal proposal and during the renewal hearings. *See* Pet. App. 18a-19a (quoting statements from Madison's renewal proposal). Madison never submitted "customer surveys" to the City or to the court. There is thus no reason for this Court to suppose the lower courts' conclusion involved any error, much less error of constitutional dimension.

[15] As the holder of a franchise that had not been renewed for cause, Madison's alleged injury would not flow directly, *cf. S. v. D.*, 410 U.S. 614, 616-617 (1973), from the City's separate decision in favor of municipal ownership and hence Madison has no standing to challenge this action. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485 (1982). *See also Gladstone v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)). Madison's present interest in the question of municipal ownership is even less than the interest of the general public. *Cf. Warth v. Seldin*, 422 U.S. at 499-502. The City Council has already concluded that Madison has demonstrated neither the sort of care or candor that the City had a right to expect from a franchisee nor the ability to respond to local problems because of absentee control (*see supra* at 8 n.8). Any decision by this Court on the municipal ownership issue would not change Madi-

The City has not granted itself a monopoly over the cable medium or prohibited speech by others, as the North Carolina Supreme Court found, 325 N.C. at 654, 386 S.E.2d at 211-12:

> Morganton has not declared or established itself as the "exclusive" supplier of cable television service to its citizens. It has simply failed to renew Madison Cable's expired franchise or to grant a franchise to two other applicants for failure of their proposals to meet community needs. Specifically, it has not foreclosed for any period the possibility that franchises might be granted to other applicants.

Moreover, the City cannot monopolize or control speech on the municipal cable system. Congress specifically contemplated and authorized establishment of municipal cable systems. 47 U.S.C. § 531(e)(1). Congress, however, prohibited municipalities that establish such systems from controlling the content of cable services carried over the cable system, "unless such control is exercised through an entity separate from the franchising authority." 47 U.S.C. § 531(e)(2). Consequently, the City will not be picking and choosing the programming services carried on the system, and it will not be permitted to control the content of the programming services provided.[16] Indeed, Madison and others will be able to speak via cable in Morganton even after a municipal system is established. The City will set aside channels and provide facilities and equipment which any person, including Madison, can use at no charge to create and cablecast programming.

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son's position of having lawfully been denied renewal and accordingly any decision by this Court would be merely advisory.

[16] It would be hard to imagine how a city-owned cable system could control the content of cable programming services in any event. As Madison suggests, the primary speech activity in which cable operators engage is the packaging of programming actually produced by others. Pet. 9 and n.5. Once the programming services are selected, the content of the services do not vary depending on who owns the cable facility.

The City cannot control the content of programming carried on these "access" channels. 47 U.S.C. § 531. Additionally, given the capacity of the system it proposes to build, the City will be required by federal law to set aside certain channels for "leased" use by others, including Madison. 47 U.S.C. § 532.

Thus, the first question that Madison asks this Court to review is not presented on this record. The issues in this case have nothing to do with control of speech, as Madison's Petition presumes, but instead concern the management of public property and public facilities. Madison is claiming that, if particular public property can accommodate only one facility that can be used for speech, the City forfeits its right to build a publicly-owned facility and is instead constitutionally required to turn over control of public property to a private person, even if the result is fewer public benefits and affirmative public harm (and even if there are no qualified private applicants). *See* C.A. App. 112-23.

This proposition is fundamentally at odds with the decisions of this Court, including *Ward v. Rock Against Racism*, which holds that a city may own and control the sound system at a municipal bandshell, and may require all who use the bandshell to use the municipal sound system. Governments own dozens of facilities that are used for communication by government and others—libraries, theatres, auditoriums, public television stations, parks, museums and the like. This Court has never held that government must turn control of even unique public facilities over to private parties; it has instead allowed government to maintain control of those facilities, and to control access to them. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (mailboxes used to communicate with teachers); *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985) (medium for charitable solicitation in government buildings); *Lehman v. City of Shaker Heights*,

418 U.S. 298 (1974) (advertising space on buses). That there is one Lafayette Park does not mean that the Park Service must relinquish control of the facility to protestors, to use as they wish, even on a temporary basis. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (government may regulate uses which make property inaccessible to others, even though that regulation directly affects speech). *A fortiori*, there is no constitutional requirement that government grant, in the name of the First Amendment, a permanent interest in scarce rights of way to a cable company.[17] The wisdom of this approach is particularly obvious on the facts here. Madison offered to build a relatively low-capacity system, with limited technical capabilities, generally not available for use by others. The City proposed to build a significantly higher-capacity, more technically advanced system, open to every member of the public (including Madison). Adopting Madison's view of the law simply does not advance the First Amendment. Accordingly, the courts below correctly rejected the claims presented on this record.[18]

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[17] Madison claims *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728 (2d Cir. 1985), compels the opposite result, but the case is inapposite. Legi-Tech sought access to a state data base which was open to other members of the public. It did not claim that the state was prohibited from owning the data base or that the state was required to sell the data base to a private party merely because the data base was the sole source of the information Legi-Tech required for its business. The Second Circuit thus did not address the point pressed by Madison, namely, that where there can be only a single facility on public property, control of the facility must be turned over to a private party. Indeed, to the extent the case is relevant at all, it undercuts Madison's claim. The Second Circuit emphasized that Legi-Tech was seeking only the same rights of access afforded the general public. 766 F.2d at 735-36. Here, Madison claims that, where only one franchise can be issued, a special right of access must be granted to a single private party.

[18] Madison's position is akin to that of a lessor who bargains for the right to operate a public auditorium on city property in return

B. Madison's Second Question Incorrectly Assumes That the Courts Below Ignored Evidence It Sought To Present.

Madison claims that certiorari must be granted because the courts below ignored affidavits that precluded summary judgment. As noted above at 11-13, while the district court ruled that the affidavits should not be considered, it also reviewed the affidavits and concluded that, even if the affidavits were considered, summary judgment must be granted to the City. Pet. App. 20a. Thus, the second question Madison asks this Court to review is premised on a mischaracterization of the decisions of the courts below; given the alternative resolution by the lower courts of the evidentiary issues, there is no need for this Court to reach the issue posed by Madison.

II. MADISON FAILS TO IDENTIFY ANY ERRORS MADE BY THE LOWER COURTS THAT WARRANT REVIEW.

A. The Lower Courts Correctly Applied the *O'Brien* Test In Reviewing the City's Action.

Madison contends that certiorari is warranted because the lower courts "made no effort whatsoever" to determine whether the ordinance adopted by the City was necessary to advance substantial governmental interests, and instead merely "deferred" to the City's judgments. Pet. 14. Much of Madison's attack is based on a criticism of conclusions the courts never drew (*id.* at 13), and a pointed refusal to address the analyses performed by the

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for the promise to sell the auditorium to the city after 20 years or remove it to make space for a better facility. At the end of the 20-year term, the lessor can hardly claim a right to maintain its position permanently on the ground that it is a speaker. Nor can it demand (as Madison does here, *see infra* at 21-22) that the city must turn over the facility to it or to another private speaker and then buy additional land if the city wishes to establish its own theater or provide for a better auditorium.

courts, which show that the courts closely scrutinized the City's actions. *See* Pet. App. 18a-20a, discussing the City's decision to license only one system in light of the evidence before it.[19] But, the central point of Madison's claim is that, under *O'Brien*, a court must strike down a regulation if there is any "less drastic measure" which would advance the substantial interests the government seeks to protect. Pet. 12.

In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984), and *Rock Against Racism*, 491 U.S. at 798-99, this Court "squarely rejected" the approach urged by Madison. While restrictions on speech must be "narrowly tailored" to serve a substantial governmental interest, a restriction "need not be the least-restrictive or least-intrusive means" of advancing that interest. 491 U.S. at 798-99. The *O'Brien* test is satisfied if government shows that the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation. *Community for Creative Non-Violence*, 468 U.S. at 297. The district court applied precisely this test in reviewing the City's actions. Pet. App. 18a. There is no legal error warranting review.

Moreover, while Madison contends that the courts below ignored "obvious" and less restrictive alternatives open to the City (Pet. 13), it fails to cite a single example of a practical alternative that would have advanced the City's substantial interests, and hence fails to suggest a reason why the decisions below should be reviewed, even were Madison's theory of the law correct.

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[19] At note 7, for example, Madison contends that the lower courts eschewed *de novo* review of the City Council's decision, citing Pet. App. 13a as proof of the point. All the district court states there, however, is that it will not decide as a policy matter whether the City's choices are good or bad—an unobjectionable position. Nothing in the decision suggests the district court avoided its obligations to consider whether the City's actions comported with the First Amendment.

Madison claims, for example, that if the City were concerned about Madison's performance, it could have simply allowed "additional competition" or imposed "reasonable minimum service requirements" on Madison. Pet. 13. But this "alternative" ignores the obvious fact that everyone, including Madison, told the City that it would not be feasible to add an additional system; authorizing "additional competition" would have been a fruitless act. It also ignores the fact that the City had good reason to believe Madison would not meet the needs of the community, even if its obligations were spelled out in a franchise contract. A central claim below, after all, was Madison's contention that it did not have to abide by its contractual obligation to remove wires from poles or sell its system to the City. C.A. App. 27-31.

Madison contends that the least disruption to rights of way would occur if Madison were allowed to remain where it is. Pet. 13. This may be so, but as the courts below concluded, leaving Madison the entrenched monopolist prevents optimal use of public property and harms other substantial government interests. Pet. App. 17a-18a. Madison makes the related claim that, allowing it to remain on the poles while changes are made to accommodate a second system would involve "only slightly more disruption, if any" than leaving Madison alone on the poles. Pet. 14. This unsupported claim is disingenuous in light of Madison's statement to the City that half the poles in the City would have to be replaced, 90% would require substantial work, and service interruptions could occur. Pet. App. 18a-19a.

The essence of Madison's claim is set forth at Pet. 14 n.8, where it suggests, almost offhandedly, that the "less drastic measures" test requires the City to build new facilities to accommodate Madison's system. That claim is wrong. The First Amendment does not require government to subsidize the speech of any speaker. *Regan v. Taxation With Representation of Washington*, 461 U.S.

540 (1983). Forcing government to install the poles and facilities necessary to accommodate Madison's cable system would require a subsidy of the most egregious sort. On this record, the lower courts' decisions were correct, no matter what standard of review is used.

B. The Courts Did Not Err In Ruling In the Alternative That Certain Affidavits Submitted By Madison Should Be Ignored.

Madison contends (Pet. 15-17) that certiorari is warranted because the lower courts ignored facts that precluded summary judgment and instead confined their review to the record before the City Council at the time it made its decision regarding Madison's request for renewal. Setting aside other problems with this claim (*see supra* at 11, 13, 19), the only evidence Madison sought to introduce was evidence that was intended to contradict its own statements made in the franchise hearings before the City Council.

The lower courts' refusal to consider this information is consistent with general principles of law. A party cannot avoid summary judgment by submitting affidavits to contradict itself. *Foster v. Arcata Assoc. Inc.*, 772 F.2d 1453, 1462 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). It cannot "invite error" and then claim the resulting decision should be reversed. *Harvis v. Roadway Express*, 923 F.2d 59 (6th Cir. 1991). It follows that First Amendment claims cannot be created by saying one thing to a city to induce an action, and then later revising the facts if the result is unsatisfactory. If an applicant for a parade permit told a city it wished to close 40 city blocks during rush hour, and was denied a permit because of the effect on competing uses, the applicant could hardly argue that its First Amendment rights were violated because, in fact, it had meant to parade only on one block at midnight. A city can be expected or required to respond only to the information

before it, and the courts below were entitled to decide this case on that basis.

Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829 (1978), the case on which Madison most heavily relies for the proposition that it is entitled to adduce evidence beyond the record, does not compel a different conclusion.[20] *Landmark* involved review of a viewpoint-based restriction on speech, and hence required the strictest scrutiny of the government action. This is not such a case, as Madison's Petition reveals. Where *O'Brien* is applied, the Court uses a different and less stringent standard of review that focuses on the reasonableness of the legislature's decision. *Rock Against Racism*, 491 U.S. at 798-800 and n.6; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). Moreover, *Landmark* involved review of a legislature's conclusory determination, without supporting facts in the record, that a certain type of speech constituted a clear and present danger. 435 U.S. at 843. The Court was concerned that the affected speaker have the opportunity to show that this bare legal conclusion was

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[20] Other cases relied on by Madison also tend to support the City's arguments. Madison's use of *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), depends on creative editing. The quote, truncated in Pet. 16 n.9, goes on to emphasize that "[w]here there was evidence before the legislature reasonably supporting the [action], litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." *Id.* Madison also cites *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924), *Kress, Dunlap & Lane, Ltd. v. Downing*, 286 F.2d 212 (3d Cir. 1960), and *Milnot Co. v. Richardson*, 350 F. Supp. 221 (S.D. Ill. 1972), but these cases merely stand for the proposition that, where the parties allege that changed circumstances have altered the validity of the record, the Court can look beyond the record. Madison, of course, has not urged "changed circumstances." *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926), stands for the proposition that where no one objects to introduction of extra-record evidence, a Court of Appeals will not on its own motion find admission of that evidence to be reversible error.

not justified. 435 U.S. at 844. The opposite case is presented here. Madison *did* have the opportunity to challenge all relevant facts and to present issues. In fact, Madison's main problem is that the City took Madison at its word: that to avoid harm to the City and to the public, it should select the best qualified operator. Because there is plenary factual support for the City's decision, *Landmark* does not require looking beyond the record which was before the City.

Strong public policy reasons justify restricting review to the record here. The authority and ability of a city to conduct a rational cable franchising process depends on its ability to develop and rely on a record.[21] To allow a franchisee to challenge the franchising process on the basis of information that is contrary to information it presented earlier or that could have been presented, but was not, undermines legislative decisionmaking. Legislatures, like courts, have a compelling interest in protecting the integrity of their processes. Madison cannot now be heard to complain that the City's decision to limit cable franchising to one operator is factually without support when the Council's decision is fully supported by Madison's own representations to the City.

C. The Lower Court Decisions Are Consistent With Decisions of Other Circuit Courts.

Madison erroneously claims that the approach taken by the lower courts here is in "marked contrast" to the approach taken by other courts. Pet. 14. In fact, the decisions below are consistent with the relevant decisions of the Courts of Appeals which have reviewed the constitutionality of franchising. In *Central Telecommunications, Inc. v. TCI Cablevision*, 610 F. Supp. 891 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert.*

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[21] Under the Cable Act, the City has express responsibility for making franchising decisions. 47 U.S.C. § 541(a)-(b).

denied, 480 U.S. 910 (1987), the Eighth Circuit ruled that a City could deny renewal to TCI based on the physical and economic characteristics of cable, emphasizing:

> TCI gained its monopoly through an earlier grant of a de facto exclusive franchise. Unless the City opened up competition *for* the market [through a competitive franchising process], TCI would have remained entrenched in its monopoly position. TCI refused to provide other than an outmoded limited channel system whereas Central proposed a state-of-the art system . . . . It is difficult for us to see how, on this record, TCI's position enhances First Amendment values.

800 F.2d at 717 (emphasis in original). To the same effect are *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). *See also Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988). The Ninth Circuit decision in *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986), is not inconsistent with the Fourth Circuit decision, because it does not address the application of the First Amendment to situations where only one system can be accommodated. This Court has, in any event, refused to adopt the reasoning of the Ninth Circuit. *City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 493 (1986).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 31, 1992